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In The
Supreme Court of the United States
October Term, 2004

Norma McCorvey, fka Jane Roe,
Petitioner,
v.
William "Bill" Hill, Dallas County District Attorney,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF ADMINISTER JUSTICE and THE CENTER FOR LAW AND CULTURE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

BRUCE D. STROM*
ADMINISTER JUSTICE
201 Penny Ave., Ste. 420
East Dundee, IL 60118
(847) 844-1100

CHARLES J. EMMERICH
THE CENTER FOR LAW
AND CULTURE
6601 W. College Dr.
Palos Heights, IL 60463
(708) 239-4773

**Counsel of Record*

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INTEREST OF THE AMICUS CURIAE[1]

Administer Justice is a nonprofit low-income legal service provider and educational organization dedicated to administering justice through a comprehensive program of educational outreach, legal assistance, financial counseling and conflict resolution services. Because of its commitment to the poor and powerless, Administer Justice opposes the disparate impact abortion has on the poor. The complicated issue of poverty and abortion needs to be given voice and be heard by the Court to determine whether to reconsider its opinion in *Roe v. Wade*, 410 U.S. 113 (1973).

The Center for Law and Culture is a national nonprofit organization committed to recovering the traditional Judeo-Christian understanding that law is based on a moral order grounded in God's authority as Creator. The Center conducts research and educational initiatives concerning the nature and sources of fundamental law. The Center's Executive Director, Professor Charles J. Emmerich, co-authored the book, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses*, which has been cited by the United States Supreme Court.

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[1] Counsel of record for the parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court pursuant to Rule 37. Pursuant to Rule 37.6, amicus Administer Justice and The Center for Law and Culture disclose that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than amicus curiae.

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BRIEF OF
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SUMMARY OF ARGUMENT

More than thirty years have passed since *Roe v. Wade*, 410 U.S. 113 (1973) was decided. In the intervening years significant changes have occurred in medicine and technology that ultimately led this court in *Planned Parenthood of S.E. PA v. Casey*, 505 U.S. 833 (1992) to reject *Roe's* rigid trimester framework. Three Justices in *Casey* implicitly acknowledged the inherent difficulties in *Roe's* "fundamental right" standard and interposed an "undue burden" standard. These modifications cannot correct the underlying fundamental flaw in providing elevated constitutional protection to abortion.

The Court in *Casey* was concerned that *Roe*'s rule could not be repudiated without serious inequity to people who, for two decades of economic development, had made choices relying upon the availability of abortion which had facilitated "the ability of women to participate equally in the economic and social life of the Nation." *Casey, supra,* 505 U.S. at 846. In doing so, the Court failed to examine the true economic statistics which belie such an argument. Even when *Roe* was decided, the Court hoped that this new right afforded women would accomplish such a purpose, but Justice Blackmun's fear that "poverty and racial overtones" would complicate the problem, has proven far more accurate. *Roe, supra,* 410 U.S. at 116.

Statistically, abortion has a catastrophic disparate impact on those living at or below the poverty line in comparison to those of better economic status. This affect upon the poor has similarly and simultaneously affected minorities. As a class, minorities are over represented in abortion statistics and the numbers of abortions among minorities are disproportionate to their numbers among the general population. Amicus Administer Justice is a low-income legal service provider that represents the poor and minorities who have been victimized by the constitutional barrier imposed by the court in *Roe* and subsequent cases. As Mr. Justice White correctly noted in his *Roe* dissent, the court "interpos[ed] a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs." *Roe, supra,* 410 U.S. at 222.

The Court should recognize that the abortion issue is not amenable to a "personal rights" analysis; it is different. The Court should acknowledge this difference and the profound and tragic consequence the decision has had on the very individuals ostensibly sought to be protected - poor and minority women. The very real negative economic impact of abortion should be considered when gauging the respective costs of reaffirming or overruling *Roe* and should tip the balance of justice in favor of overruling.

ARGUMENT

I. THIS CASE AFFORDS THE COURT THE OPPORTUNITY TO REFLECT UPON THE BITTER LEGACY OF ITS RULING IN *ROE v. WADE.*

Mr. Justice Blackmun recognized some of the inherent problems the Court would encounter when legislating liberty in the abortion context. As he observed:

> One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion. In addition, population growth, pollution, *poverty and racial overtones,* tend to complicate and not to simplify the problem.

Roe v. Wade, 410 U.S. at 116 (emphasis supplied).

The lower courts in *Roe* heard no facts and took no evidence to inform this court of the true impact of abortion. Time has yielded statistics that demonstrate the broader implications of the bitter legacy of the *Roe* ruling upon the disadvantaged of this country.

A. The ruling in *Roe v. Wade* has had a disparate impact on the poor and minorities.

The plight of the poor is complex and has engendered much disagreement in this Court in the abortion context.[2] This Court in

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[2] *See Beal v. Doe,* 432 U.S. 438, 456-57 (1977) ("I am appalled at the ethical bankruptcy of those who preach a 'right to life' that means, under present social policies, a bare existence in utter misery for so many poor women and their children." Brennan, J. dissent); *Beal v. Doe,* 432 U.S. at

desiring to administer equal justice to all has not been uniform in how it treats the poor. On the one hand, this Court in *Maher v. Roe*, 432 U.S. 464, 470-71 (1977), stated: "This case involves no discrimination against a suspect class. An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases." On the other hand, this Court has advanced a line of cases which stand for the proposition that if the State chooses to provide a service it "can no more discriminate on account of poverty than on account of religion, race, or color." *Griffin v. Illinois*, 351 U.S. 12, 17 (1956)[3].

The Court recognized in *Griffin* that "a law nondiscriminatory on its face may be grossly discriminatory in operation." *Id.*, 351 U.S. at 17, n. 11. While applied in a legislative context, the

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463 ("There is another world 'out there,' the existence of which the Court, I suspect, either chooses to ignore or fears to recognize. And so the cancer of poverty will continue to grow." Blackman, J. dissent); *See also Harris v. McCrae*, 448 U.S. 297, 316 (1980)(Majority upholds constitutionality of the Hyde Amendment in part on its belief that "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."); *Contrast Harris v. McCrae*, 448 U.S. at 333 "Accurate as this statement may be, it reveals only half the picture. For what the Court fails to appreciate is that it is not simply the woman's indigency that interferes with her freedom of choice, but the combination of her own poverty and the Government's unequal subsidization of abortion and childbirth." Brennan, J. dissenting).

[3] *Griffin* involved the right to a free transcript on appeal in a criminal case. *See also Boddie v. Connecticut*, 401 U.S. 371 (1971) (State's imposition of a fee to obtain a divorce violates due process rights of the indigent); and *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996)(State's imposition of a fee for a transcript in civil termination of parental rights hearing violates both the equal protection and substantive due process rights of the poor). There appears to be a distinction without a difference in these cases. Why does an indigent mother have equal protection and substantive due process protection in a procedure to terminate her rights in a child post-birth, but not in a procedure to terminate her rights in a child pre-birth?

argument is no less compelling in the context of the constitutionally created law in *Roe*.

The application of the right to privacy in the abortion arena has been grossly discriminatory in operation. Poorer women are over represented among abortion patients. According to a study of patterns in the socioeconomic characteristics of women obtaining abortions in 2000-2001, 58% of women having abortions in 2000 were poor or low-income (27% below poverty line, 31% with incomes of 100-199% of poverty line), compared with 30% of women in the general population. *see* R.K. Jones, J.E. Darroch, and S.K. Henshaw, *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000-2001*, Perspectives on Sexual and Reproductive Health. Volume 34, Number 5, 231 (September/October 2002). Raw numbers show that disadvantaged women have a much higher rate of abortion per pregnancy than do the rest of the population. In fact, the rate of low-income women is twice as high as that of women with higher economic status, with low-income women aborting 33% of their pregnancies and higher income women aborting 15%. *Id.* Additionally, the rate of abortions among women who receive Medicaid healthcare is three times higher (57 per 1,000) than those who do not receive Medicaid. *Id.*

These statistics, rates, and the negative impact they demonstrate are representative of the impact caused by the *Roe* ruling. The percentage of poor women obtaining abortions since *Roe* reached its peak in 1987, before declining until 1994. From 1994 to 2000, while abortions were in a general state of decline the rate among low-income women actually rose 25%. *Trends in Abortion in the United States, 1973-2000.* The Alan Guttmacher Institute (January 2003).

When comparing the statistics regarding poverty levels from the U.S. Census of 2000 to the rate of abortions per pregnancy, an associated pattern develops. As the percentage of the population living below the poverty line increases so does the rate of abortions per pregnancy.[4] Examples from Illinois where Amicus

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[4] Compare generally, *Data derived from Population Estimates, 2000,*

Administer Justice serves low-income individuals, are Jackson and Kane counties. According to the U.S. Census Bureau based on data derived from the 2000 census, these counties have populations below the poverty line of 25% and 8% respectively. Yet according to the Illinois Department of Public Health the abortion rates for these counties are 20% and 7% respectively. This theme of low-income women comprising a disproportionate percentage of those having an abortion is common throughout the country.

The disproportionate impact of *Roe* on the poor has created a corollary impact on minorities. Between 1994 and 2000 the percentage of hispanic women receiving an abortion was 20% and that of blacks was 32%. Therefore, while these two groups combined make up only 16% of the general population, they obtained more than half, 52%, of all abortions. *Patterns in the Socioeconomic Characteristics of Women obtaining Abortions in 2000-2001, supra, at 232.* The lowest rate of abortions per pregnancy of all races is that of whites which is 13 per 1000, with blacks having a rate three times as high as that and hispanics having a rate two and a half times as high. *Induced Abortion*, The Alan Guttmacher Institute (2003). Time has demonstrated the severity of the disparate impact on minorities and the poor and the Court should recognize this impact in reconsidering its opinion.

B. The ruling in *Roe v. Wade* has further complicated the abortion controversy among the poor and minorities by creating constitutional confusion in the availability of educational information.

This Court has observed that "it is desirable and imperative that [the decision to abort] be made with full knowledge of its nature and consequences." *Planned Parenthood of Central Mo. v.*

U.S. Census Bureau: State and County QuickFacts with *2000 Induced Pregnancy Terminations*, Illinois Department of Public Health, available at http://www.idph.state.il.us/health/abortion/abort00.htm.

Danforth, 428 U.S. 52, 67 (1976). Yet the Court has gone on to create such constitutional confusion that states are left not knowing how they can help their citizens become better informed for fear of crossing a shifting constitutional barrier. On the one hand, members of this Court have argued there ought to be equality of information. *See for example Beal v. Doe,* 432 U.S. at 463: "This is a sad day for those who regard the Constitution as a force that would serve justice evenhandedly and, in so doing, would better the lot of the poorest among us."(Blackmun, J. dissent). Yet when the argument has sought to compel private abortionists to provide equal information, the Court has held such action unconstitutional. *Akron v. Akron Center for Reproductive Health, Inc.*, 426 U.S. 416 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986). At the same time, several members of the Court have objected to the government limiting information in the Title X context. *Rust v. Sullivan*, 500 U.S. 173 (1991). This dichotomy can be explained only through the differing applications of the "fundamental right" created in *Roe.*

Amicus Administer Justice has spoken with many women, and has the affidavits of more than a thousand women, who have had abortions because they were uninformed and felt they had no alternatives: Poor women like Mary Doe, who was 22-years-old and living with her indigent parents. Doe was advised that an abortion could be performed on her with less danger to her health than if she gave birth to the child she was carrying and that she would be unable to care for or support the new child in her poverty. *See Doe v. Bolton*, 410 U.S. 179, 185 (1973)[5] As a homeless woman living in a park, the petitioner, Norma McCorvey

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[5] Mary Doe, Sandra Cano, now states in her affidavit: "I neither wanted nor sought an abortion. I was nothing but a symbol in *Doe v. Bolton* with my experience and circumstances discounted and misrepresented... The real experiences of the women must be known and taken into consideration by the court. Abortion is too much what others would like a woman to do, rather than what is in her interest and what she really wants." Para. 2, 22.

fka Jane Roe, was treated the same way. She remarks in her affidavit:

> In a way my exclusion, and the exclusion of real meaningful findings of fact in *Roe v. Wade*, is symbolic of the way the women of the nation and their experiences with abortion have been ignored in a national debate by the abortion industry... Early in my abortion career, it became evident that the 'counselors' and the abortionists were there for only one reason - to sell abortions. The extent of the abortionists' counseling was, 'Do you want an abortion? Ok, you sign here and we give you abortion.' Then he would direct me, 'You go get me another one.' There was nothing more. There was never an explanation of the procedure. No one ever explained to the mother that the child already existed and the life of a human was being terminated. No one ever explained that there were options to abortion, that financial help was available, or that the child was unique and irreplaceable. No one ever explained that there were psychological and physical risks of harm to the mother. There was never time for the mother to reflect or to consult with anyone who could offer her help or an alternative. There was no informed consent... The doctors always hid the truth from the mothers... [6] Aff. Para.16, 20.

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[6] Jane Roe, Norma McCorvey, goes on to recall a specific example: "I remember one woman who came in for an abortion, a pretty, sweet young woman about eighteen years old, with a teddy bear. During the procedure she looked down and saw the baby's hand fall into the doctor's hand. She gasped and passed out. When she awoke and asked about what she saw, I lied to her and told her it didn't happen. But she insisted that she had seen part of her baby. A few weeks later when she returned for her follow-up exam, she was a changed person: her sweetness had died and had been replaced with an indescribable hardness. I could not look her in the eye. It took quite a few beers that night to make that particular day go

The concerns of Mary Doe and Jane Roe are representative of more than 1,000 women filing affidavits in this case.[7] Mr. Justice Stewart
recognized the seriousness of these issues by describing the procedures followed at one abortion clinic:

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away." Aff. Para. 22

[7] Another women called Colleen wrote the following gripping testimony published in the *Post-Abortion Review*, Vol. 1, page 3 (Fall 1993):

"I realized I was pregnant when the smells from chemistry class kept making me sick. A friend convinced me to go to her doctor in town. He diagnosed pregnancy immediately, saying, 'Such a shame, another young one.' He told me not to worry, that "it" could be taken care of.' He never once said anything about keeping the baby, but gave me a card from the local abortuary. Although I had no strong religious convictions, the visit to the clinic for my initial 'consultation' left me feeling bad. The nurse told me to come back in a week with the money to have it done... I was very scared, mostly of the pain they said I might feel. With the counselor, I mostly cried. But she just agreed with everyone I had talked to. Yes, this is a bad time to have a child. Yes, you're too young. Yes, having a child costs lots of money. Yes, it would be hard for you to raise a child on your own. Yes, this is the best thing to do. Waiting to have my name called, I tried to convince myself of these things. I just wanted the whole thing to be over with.

Finally they called me in and put me on a table. The dilation was extremely painful. A counselor held my hand and told me not to cry, it would be over very soon. The suction machine was very loud -- a horrible noise. They had a picture on the ceiling for you to look at so you wouldn't have to think about what was happening to you. The image of that picture is burned into my memory. They took my baby from me while I looked at people walking in the rain.

In the end, the abortion did not 'solve all my problems' as everyone had promised....

I know now the lies I was told, the truths that were withheld from me, the facts that were glossed over or left out. As a pregnant woman, I go to my doctor's office and see pictures of babies in tummies. Month by month, I hear my baby's heartbeat. I'm told how to do everything that's best for my baby's health. Why is it legal across town to NOT tell these things?"

Colleen's question is indeed a constitutional conundrum.

> The counseling... occurs entirely on the day the abortion is to be performed... It lasts for two hours and takes place in groups that include both minors and adults who are strangers to one another... The physician has no prior contact with the minor, and on the days that abortions are being performed at the [clinic], the physician... may be performing abortions on many other adults and minors... On busy days patients are scheduled in separate groups, consisting usually of five patients... After the abortion [the physician] spends a brief period with the minor and others in the group in the recovery room...

Planned Parenthood of Missouri v. Danforth, 428 U.S. at 91 n. 2 (1976) cited with approval by the majority opinion in *Bellotti v. Baird*, 443 U.S. 622, 641 n. 21 (1979).

The deception and deprivation experienced by these women are not rare isolated cases. Rather, they are typical characteristics of young, economically disadvantaged women seeking an abortion.

Abortion is "big business" and those performing abortions have no incentive to provide complete information because they can hide behind the fundamental right of the mother to have the abortion.[8] Abortion clinics in 2000 provided 93% of all abortions and 65% of these abortions were performed by mass clinics that

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[8] For a devastating critique of the abortion industry, see Bernard N. Nathanson, The Hand of God (1996). In discussing his early career as an abortionist, which entailed directing the world's largest abortion clinic located in New York City, Dr. Nathanson stated: "Mass scale efficient abortion technology had joined hands with the prevailing *zeitgeist* to make possible the assembly-line abortion clinics so desperately needed to free the hospitals to carry on there conventional duties... The New York state law allowing abortions up through the twenty-fourth week of pregnancy would soon be replaced by *Roe v. Wade* which, despite some window dressing about the states' right to restrict abortion in the third trimester, would effectively permit abortion until labor. All that was missing now, in 1970, was the administrative skill to put the mass-scale extermination technology into practice." *Id* at 101.

perform more than 1,000 procedures a year. L.B. Finer and S.K. Henshaw, *Abortion Incidence and Services in the United States,* Perspectives on Sexual and Reproductive Health, 12 (2003). This exploits the poor who do not have the same access to information as a person of greater means. In effect, *Roe v. Wade*, in the name of protecting privacy, has only served to abolish accountability and has handed over the welfare of the poor and uneducated to the abortion industry. The demographic group that suffers most is the poor, not only because they make up 58% of the industry, but because they are taken advantage of most easily.[9] It appears that when the court declared that the abortion procedure was private, it unknowingly also declared abortion education to be private and therefore incomplete.

The latest socioeconomic statistics from the Alan Guttmacher Institute indicate that although abortion rates as a whole have been declining, the rates are decreasing sharply among women with a college education and increasing most among economically disadvantaged women, those covered by Medicaid, and women with less than a high-school education. *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000-2001, supra* at 232.

The victimization of the poor and uneducated is magnified through an analysis of the abortion rate statistics of the twenty-seven states that were successfully implementing "informed consent" laws in the year 2000. M.J. New, *Analyzing the Effects of State Legislation on the Incidence of Abortion During the 1990's.* Center for Data Analysis Report #04-01. The Heritage Foundation (January 21, 2004) available at http://www.heritage.org/Research/Family/ CDA04-01.cfm. The

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[9] Consider what one former abortionist, Dr. Albert Brown, says:

> [C]linics that cater to the poor are particularly prone to bad conditions, because the poor and minorities are least likely to report problems. [Latino women] are some of the best patients. They come in and they don't complain. Sometimes they are given abortions when they are not even pregnant... It's an unregulated industry.

J. Marquis and L. Romney, *Handful of Abortion Clinics Pit Poor at Risk,* Los Angeles Times (April 5, 1998).

purpose of these laws is to further educate women who would not normally have access to information related to their pregnancy and the abortion procedure. When examining data from the center for Disease Control, informed consent laws have reduced the abortion ratio (number of abortions per 1,000 live births) by 11.69 and the abortion rate (number of abortions per 1,000 women between the ages of 15 and 44) by 0.92. Data from the Alan Gutmacher Institute indicates an even greater effect, reducing the abortion ratio by 22.46 and the abortion rate by 1.57. *Id.* Statistics such as these indicate that women are less likely to have an abortion if simply exposed to unbiased facts on the abortion procedure. The affidavits of the original "Roe" and "Doe" along with over one thousand women filing affidavits in this case, attest to the fact that complete, unbiased information is not readily available.

Without a dramatic overturning of the Court's emphasis on privacy, the plight of the poor and uneducated can only worsen.

II. THE DECISION IN *ROE V. WADE* CONSTRUING ABORTION AS A "FUNDAMENTAL RIGHT" WAS MISGUIDED JUDICIAL LEGISLATION THAT HAS HAD A SIGNIFICANT ADVERSE IMPACT ON ECONOMICALLY DISADVANTAGED WOMEN, AND SHOULD THEREFORE BE OVERTURNED.

A. The Court engaged in judicial legislation when rendering its decision in *Roe v. Wade* to the detriment of economically disadvantaged women.

Justice Iredell in *Calder v. Bull*, 3 U.S. 386, 399 (1798) set forth the long standing role of the Court in reviewing legislative determinations:

> I admit, that as the authority to declare [an act of Congress] void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the legislature of the Union, shall pass a law, within

> the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principals of natural justice.

Under the guise of protecting a women's constitutional right to privacy, this Court embroiled itself in a legislative balancing test of competing interests with an unborn child which time has proven to have been ill-conceived. In two different oral arguments the Court wrestled with the constitutional issue framed as a substantive due process liberty right. Wanting to protect poor women from back alley abortions, this Court fashioned a remedy far broader than necessary. This remedy has proven over time to be a bitter pill with serious repercussions to the very individuals the Court thought it was assisting. As Mr. Justice Rehnquist argued in his *Roe* dissent, "the Court departs from the longstanding admonition that it should not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' (Citation omitted)." *Roe v. Wade,* 410 U.S. at 172.

The Court's decision in *Roe v. Wade*, "partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment." *Roe*, 410 U.S. at 174 (Rehnquist, J. dissenting).

The decision in *Roe v. Wade* has given rise to a situation where the unintended consequences of the Court's involvement in legislation has created an adverse impact upon a group of people possessing little voice to raise awareness of the injustice of their plight. In his concurring opinion in *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 241 (1995), Mr. Justice Thomas warned of the dangers of "unintended consequences" resulting from well-intentioned decisions made on the basis of race. Likewise in *Roe* the Court's crossover into legislation, however well-meant, has had the unintended consequence of limiting the choices of the poor and minorities in this country.

In its subsequent treatment of the *Roe v. Wade* decision, the Court has demonstrated a seeming recognition of an experiment in social legislation gone awry. As Mr. Justice White astutely

observed in 1989, "The key elements of the *Roe* framework – trimesters and viability – are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle." *Webster v. Reproductive Health Services*, 492 U.S. 490, 518 (1989)(White, J. and Rehnquist, C.J. concurring). Three years later the Court recognized the wisdom of this observation in *Planned Parenthood of S.E. PA v. Casey*, 505 U.S. at 843, stating: "A framework of this rigidity was unnecessary and in its later interpretation sometimes contradicted the State's permissible exercise of its powers." It appears that the Court has moved away from the fundamental liberty interest standard established in *Roe* and, at the prompting of three Justices, has started to explore the use of an "undue burden" standard instead. *Casey*, *supra*, 505 U.S. at 876-79. Indeed, at least two Justices persisted in arguing *Roe* and *Doe* "were erroneously decided" *Louisiana State Board of Medical Examiners v. Rosen*, 419 U.S. 1098 (1975)(Rehnquist, C.J and White, J. affirming denial of writ).

If the holding in *Roe v. Wade* is sound, why has it required so much tinkering and explanation? The answer is simple: the decision in *Roe v. Wade* is not sound because the Court embarked upon a well-meant, but ultimately misguided, journey into legislation. The Court thus involved itself in a quagmire that no amount of subsequent limiting, explaining, or clarifying could, or will, correct. As Mr. Justice White recognized in the *Webster* decision, "Since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine." *Webster, supra,* 492 U.S. at 518. It is time for the *Roe v. Wade* experiment giving rise to a "code of regulations" to come to an end. The Court has sought to address these complicated regulatory issues through the application of *ad hoc* remedies like those adopted in *Webster* and *Casey*. It is time to acknowledge the grievous harm caused by *Roe* and to take the only prudent action -- reconsidering and overturning the decision, so that legislative decision making in this

socially sensitive area can be returned to the people and their elected representatives.

B. The Court's ruling in *Roe v. Wade* that abortion is a "fundamental" right is fundamentally wrong.

Over the history of our great nation, the Court has developed differing levels of scrutiny for legislative acts. In a now famous footnote, Mr. Justice Stone expounded on the Court's role in protecting civil rights by asking "whether prejudice against discrete and insular minorities may be a special condition, which may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

To this end, the Court has intervened on behalf of disadvantaged persons at several points in history to protect those persons' constitutional rights. The court has protected ethnic minorities' rights to equal education. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). The court has defended the right of persons to marry without regard to ethnic background. *Loving v. Virginia*, 388 U.S. 1 (1967). The court has defended the rights of indigent persons seeking legal aid to utilize the court system on a basis equal to those of greater means. *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). In all of these cases, the Court successfully and appropriately protected the constitutionally-grounded fundamental rights of "discrete and insular" minorities.

The *Carolene Products* "discrete and insular" rationale, however, can not be defensively applied to the volatile abortion decision because, as Mr. Justice White declared, this decision "must be recognized as *sui generis*, different in kind from the other [rights] that the Court has protected under the rubric of personal or family privacy or autonomy." *Thornburgh v. American College of Obstetricians and* Gyne*cologists*, 476 U.S. 747, 792 (1986) (White, J. Dissenting). Indeed, the Court in *Roe* appeared to acknowledge as much: "The situation [abortion] therefore is inherently different from marital intimacy, or bedroom possession

of obscene material, or marriage, or procreation, or education... ." *Roe v. Wade*, 410 U.S. at 159.

Abortion simply does not fall into the same category as the other rights traditionally protected by the Court. Why is this the case? First, it is becoming increasingly clear that there is little or no textual basis for such an expansive right to privacy in the Constitution. Instead, the *Roe* Court fashioned a constitutional right whole cloth from a penumbra of various rights. Second, the abortion question is a perfect example of the kind of issue that the founders intended for the people and their elected representatives to resolve in a free society. This Court's long and tortuous journey in wrestling with the volatile abortion issue illustrates the pitfalls resulting when the judiciary, without firm constitutional footing, takes on delicate social controversies best reserved for resolution by co-equal branches and the people. Third, and closely related, the abortion question is one that is fundamentally public rather than private and therefore better left for resolution through public debate and dialogue rather than through judicial fiat. Even the majority opinion in *Roe* conceded, "a pregnant woman cannot be isolated in her pregnancy." *Id.*, 410 U.S. at 159.

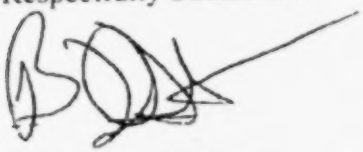
CONCLUSION

The Court's articulated fear that to repudiate *Roe* would result in serious inequity to women is grossly misplaced. The overwhelming and disproportionate number of women affected by abortion are poor and minorities who have been harmed, not helped, by the *Roe* ruling. The voices of the real women affected by *Roe* should be heard and the serious inequity which has resulted should be stopped by reconsidering and repudiating the ruling in *Roe*.

By fashioning an expansive right of privacy not found in the Constitution and then bringing the abortion decision under that rubric, the *Roe* Court unwittingly made itself a legislative body subsequently tasked with promulgating a code of regulations

governing one of American society's most volatile cultural and moral issues. This was not the role of the Court envisioned by the founders; nor is it the role of the judiciary as witnessed in the almost two hundred years of the Court's history preceding *Roe*. The inherent complexity of the issue and the inability of the judiciary to appropriately address this issue counsels a reconsideration and reversal of the *Roe* decision.

Respectfully Submitted:



Atty. Bruce D. Strom
ADMINISTER JUSTICE
201 Penny Ave., Ste. 420
East Dundee, IL 60118
(847) 844-1100

Charles J. Emmerich, J.D., LL.M.
THE CENTER FOR LAW
AND CULTURE
6601 W. College Dr.
Palos Heights, IL 60463
(708) 239-4773